In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-357

J. L. SIMMONS COMPANY, INC., PETITIONER

v.

LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ET AL.
and
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board held that the Union violated Section 8(b)(4)(B) of the National Labor Relations Act, the secondary boycott provision, by causing its members employed by petitioner Simmons, a general contractor engaged in the construction of additions to a hospital, to refuse to handle certain pre-machined doors prescribed by the hospital's architect. In de-

termining that the Union's objective was "secondary" rather than "primary," the Board applied its "right to control" test; it reasoned that, since Simmons, the party against whom the Union applied pressure, had no control over the type of door to be installed, the hospital was the Union's primary target and Simmons was a neutral, secondary employer. (Pet. App. 22a-23a.) The court of appeals adhered to its earlier holding in *Local Union No. 636, United Ass'n of Journeymen, etc.* v. *National Labor Relations Board*, 430 F. 2d 906, that the Board's exclusive reliance on the "right to control" test, applied as a *per se* rule, is contrary to the principles enunciated in *National Woodwork Mfgrs. Ass'n* v. *National Labor Relations Board*, 386 U.S. 612, and thus "must be finally abandoned" (Pet. App. 13a, 17a). It remanded the case to the Board "for a new decision, considering the union's objective 'under all the surrounding circumstances'" (Pet. App. 17a).

2. The basic question presented by the petition is whether the Board, in determining whether activity is primary or secondary for purposes of Section 8(b)(4)(B) of the Act, may properly apply the principle that the union will be deemed to have the secondary object proscribed by that section where it exerts economic pressure on an employer who is powerless to resolve the underlying dispute except by cancelling or altering his business relations with another person. The Board believes that this question—which was not presented in *National Woodwork*, *supra*, 386 U.S. at 616-617, n. 3—raises an important legal is-

sue in the administration of the Act which this Court should resolve.[1] The Solicitor General declined to file a petition for certiorari in *Local Union No. 636, supra*, which presented a similar issue, principally because, in his judgment, there was little likelihood that the Court would uphold the Board's position, and also because the decision was interlocutory since the court of appeals had remanded to the Board to determine whether the dispute involved "unit work." Accordingly, the Board did not request the Solicitor General to file a petition in the present case.

The Board believes that the decision below is erroneous, that it raises an important issue, and, accordingly, that this Court should grant the petition for a writ of certiorari. The Solicitor General believes that the petition should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

OCTOBER 1971.

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[1] Although the court of appeals remanded the case to the Board to consider the Union's objective "under all the surrounding circumstances" (Pet. App. 17a), the Board believes that the case is nonetheless ripe for review. Since the Examiner found that preparatory work on the doors was "historical and traditional unit work of carpenters at the jobsite" (Pet. App. 49a), the only circumstance which evidences the Union's secondary object is that Simmons lacked the "right to control" the work in dispute.

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